IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
November 18, 2008 Session

STATE OF TENNESSEE v. WILLIAM JEFFERY SWEET

Direct Appeal from the Criminal Court for Knox County
No. 84829 Mary Beth Leibowitz, Judge

No. E2008-00100-CCA-R3-CD - Filed July 21, 2009

The Defendant, William Jeffery Sweet, entered a plea of nolo contendere to one count of vehicular homicide by intoxication, a Class B felony, and one count of vehicular assault by intoxication, a Class D felony. In accordance with Tennessee Rule of Criminal Procedure 37, the Defendant reserved as a certified question of law the admissibility of a compelled blood-alcohol test administered to the Defendant. The trial court sentenced the Defendant to an effective sentence of fourteen years, with the first year of his sentence to be served in confinement and the remainder to be served on probation. The Defendant appeals, raising the certified question of law regarding the admissibility of the compulsory blood-alcohol test and further contending: (1) the trial court erred in setting the length of each of his sentences; (2) the trial court erred when it ordered his sentences to be served consecutively; and (3) the Tennessee consecutive sentencing statute violates the United States and Tennessee Constitutions. After a thorough review of the record and relevant authorities, we conclude that the question of law regarding the admissibility of the blood-alcohol test is not dispositive of this case and, thus, is not reviewable pursuant to Tenn. R. Crim. P. 37. Also, we conclude that the trial court erred in its sentencing determinations when it applied certain enhancement factors. However, following a careful de novo review of the Defendant's sentences, we affirm the effective sentence imposed by the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

Ralph E. Harwell (at trial and on appeal), Knoxville, Tennessee, and Ann C. Short-Bowers (on appeal), Knoxville, Tennessee, for the Appellant, William Jeffery Sweet.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Leslie E. Price, Assistant Attorney General; Randall Nichols, District Attorney General; and Steve Sword, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from a two-vehicle accident that occurred on Carmichael Road in Knoxville, Tennessee, and resulted in the death of a twenty-one year old female college student and the severe injury of her twenty-three year old fiancé. The stipulation of proof offered by the State set forth the following description of the accident underlying this appeal:

> [O]n or about the 30th day of December, 2005, Adam Flynn and his [fiancée], Erica Manning, were traveling east on Carmichael Road in Knox County, Tennessee, on their way to a friend's wedding rehearsal. At approximately 6:10 p.m. Mr. Flynn's car was struck by a vehicle being driven by the [Defendant].
>
> Emergency medical personnel were dispatched to the scene. Life-saving measures were undertaken. All three parties were transported to U.T. Medical Center for treatment.
>
> Investigator Scott Dearmond of the Knox County Sheriff's Department was dispatched to the scene to conduct an investigation since there was a potential fatality in a motor vehicle wreck. He spoke with the emergency medical personnel on the scene who informed the investigator that they did not believe that Ms. Manning would survive. They were currently performing CPR on her. Also, they told the investigator they smelled a strong odor of alcohol on [the Defendant].
>
> Investigator Dearmond did not record the names of the EMTs with whom he spoke. Rural Metro Ambulance Service informed investigators for the [S]tate that Scott Anderson and Michael Moore worked the wreck; however, neither individual [is] currently employed by Rural Metro.
>
> Scott Anderson was located upon his return from the Middle East, but he is unable to recall the accident or what he observed. The State has been unable to locate Mr. Moore at this point in time.
>
> Investigator Dearmond walked around the vehicle [the Defendant] had been driving and smelled a strong odor of alcohol coming from the passenger compartment from the car. There were no other passengers in [the Defendant's] car at the time of the wreck. Furthermore, the investigator found an unopened bottle of Vodka lying in the debris that had fallen out of [the Defendant's] car.
>
> Based on gouge and skid marks from [the Defendant's] car, the investigator determined that [the Defendant] crossed the double yellow line before striking Mr. Flynn's car on Mr. Flynn's side of the road.

While at the scene Investigator Dearmond was informed by EMS that Ms. Manning had died from her injuries.

Officer David Wise was dispatched to the hospital to obtain blood samples from both drivers. Officer Wise arrived at the U.T. Medical Center and requested that medical personnel withdraw blood samples from both Mr. Flynn and [the Defendant].

The blood sample taken from Mr. Flynn was drawn at 8:30 p.m. The blood sample taken from [the Defendant] was drawn fifteen minutes later at 8:45 p.m. [The Defendant] was unconscious at the time and was never asked for nor gave consent to have his blood drawn. The blood samples were confiscated by Officer Wise and subsequently delivered to [the] Tennessee Bureau of Investigation for forensic analysis.

Special Agent Margaret Massengill conducted tests on both blood samples. She determined that the blood sample from Mr. Flynn was negative for alcohol and other intoxicating substances. She also determined that the blood sample taken from [the Defendant] contained a blood alcohol level of .15 and the substance Diphenhydramine, commonly known as Benadryl, in an amount less than .10 [m]gs per milliliter.

The [D]efendant's car contained a black box data recording system. It was recovered by the Knox County Sheriff's Department and evaluated by accident reconstructionist Bobby Jones of Bobby Jones and Associates. The black box indicated the [D]efendant stopped accelerating four seconds before the crash and began to apply his breaks [sic] one second before the crash. The speed at the time of the crash was 59 miles per hour.

Mr. [a]nd Mrs. Daniel Hurst were traveling behind [the Defendant] before he turned onto Carmichael Road less than one minute before the wreck. They observed [the Defendant] pulling back and forth as he [weaved] . . . across Pellissippi Highway and turned onto Carmichael Road. They described this driving behavior as erratic. The Hursts then observed the [D]efendant drive off at a fast speed. They did not observe the wreck but were the first individuals to arrive at the crash scene. The Hursts did not . . . approach the vehicles.

David Cook, a former co-worker of [the Defendant], met [the Defendant] at a bar called Judy's in Knoxville after work on the day of the wreck. Mr. Cook and [the Defendant] consumed alcohol together at this time between approximately 4:30 p.m. and 5:50 p.m. Mr. Cook observed [the Defendant] consume five alcoholic drinks. Mr. Cook remembers that [the Defendant] was consuming either Vodka and tonic or Vodka and cranberry juice. Mr. Cook would describe the [D]efendant as maybe a little tipsy but not intoxicated when the [D]efendant left Judy's. Mr. Cook also admits that he had consumed five Vodka and tonic drinks in this time frame and his judgment may have been off.

The wreck occurred approximately 20 to 25 minutes after the [D]efendant left

Judy's, approximately ten miles away.

> Adam Flynn suffered serious bodily injury from the wreck, including but not limited to: fractured neck vertebra, multiple fractured bones throughout his body, los[s] of consciousness, and pneumothorax. Mr. Flynn had to wear a halo head brace and remain in traction for an extended period of time. He spent three weeks in the hospital before being discharged to a rehabilitation facility and had to undergo surgery to repair his multiple bone fractures.
>
> Dr. Brian Daily was the attending physician to Ms. Manning when she was admitted to the ER of the University of Tennessee Medical Center. She was admitted at 7:08 p.m. Upon examination Dr. Daily was unable to find a pulse on Ms. Manning. After life-saving procedures were unsuccessful, Ms. Manning was [pronounced] dead at 7:35 p.m.
>
> An autopsy . . . subsequently performed by . . . Dr. Sandra Elkins determined that the cause of death was blunt force chest injuries from the motor vehicle wreck.
>
> This all occurred in Knox County.

A Knox County grand jury issued a ten-count indictment against the Defendant for vehicular homicide by intoxication, vehicular homicide by recklessness, vehicular assault by intoxication, reckless aggravated assault causing serious bodily injury, reckless aggravated assault with a deadly weapon, reckless aggravated assault causing fear, driving under the influence ("DUI"), DUI per se, DUI second offense, and DUI per se second offense.

The Defendant subsequently moved to suppress the results of and any testimony about the blood-alcohol test administered to him after the collision while he was unconscious. The trial court held a suppression hearing wherein several Knox County Sheriff's Department officers testified about their general drug-testing procedure as well as the specific measures taken to test the Defendant's blood for the presence of intoxicants. At the conclusion of the hearing, the trial court denied the motion to suppress the blood-alcohol test results. The Defendant moved the trial court to reconsider its decision, and the trial court denied this request.

After the trial court declined to suppress the results of the blood-alcohol test, the Defendant pled nolo contendre to one count of vehicular homicide by intoxication and one count of vehicular assault by intoxication. By the time the trial court held the Defendant's sentencing hearing, Erica Manning's family had received a settlement award from the Defendant's insurance company, and Adam Flynn was in negotiations with the Defendant's insurance company. Immediately before the sentencing hearing, the State entered a presentence report, which contained a letter prepared during the mediation of Mr. Flynn's civil suit against the Defendant. The trial court granted the Defendant's request to expunge the letter from the record of the sentencing hearing. Absent the letter, the presentence report contained: an investigation report; a letter from the Defendant's personal physician; letters in support of the Defendant; victim impact statements from the parents of the

deceased victim, Erica Manning; a victim impact statement from the surviving victim, Adam Flynn, as well as his medical records; and victim impact statements from Mr. Flynn's parents. Also, the Defendant's driving and voting records were entered as exhibits.

The presentence investigation report, prepared by Investigating Officer Laura Thompson, indicated that in 1982, at age eighteen, the Defendant both graduated from high school in Knoxville and consumed alcohol for the first time. He completed his bachelor of science degree in business administration from the University of Tennessee at Knoxville in 1987. Also in 1987, he married Tracey Testerman, with whom he later had two children, who were teenagers at the time of the accident. In 1991, he began working at Highway Transport where he eventually became vice-president of sales. In August 2004, a year and four months before the wreck, the Defendant was convicted of "prohibited driving while under the influence of an intoxicant" in Texas and, as a result, served three days' jail time and paid a fine. The Defendant had no further criminal record. In his interview with Officer Thompson, the Defendant indicated that, before the wreck, he generally consumed only two beers or mixed drinks once a week, although he conceded "he was told" he consumed three to five mixed drinks the day of the wreck.

The Defendant was forty-one years old at the time of the December 2005 wreck. The investigation report contained the Defendant's description of the events immediately before the wreck. According to the Defendant, he met with several business associates over drinks a few hours before the wreck. Having earlier agreed to transport his children to a birthday party that evening, he left the gathering and made his way home. Soon after he turned onto Carmichael Road, according to the Defendant, his cell phone rang, and he looked over to where it lay on the passenger seat. As he looked back to the road, he saw the victims' oncoming vehicle and, realizing he had veered into the opposite lane, applied his brakes. He stated he remembered nothing between when his car collided with the victims' car and when he regained consciousness days later. We reproduce the Defendant's account in its entirety below:

> Most of my version is based on testimony of others who have told me about the day of the accident. My memory of that day is very foggy, at best.
>
> . . . A work associate at Highway Transport, Inc., and I met a potential employee we were trying to recruit at Judy's Restaurant on Middlebrook Pike at about 4:00 p.m. to 4:15 p.m. on 12/30/05. I consumed a few vodka/tonics in approx[imately] 90 minutes. I left between 5:30 p.m. and 5:45 p.m. I called my office as I was leaving and a few minutes later I called home. My children were in a hurry for me to get home to take them to their cousin's birthday party, so this caused me to drive a little faster than normal. I then connected my mobile phone with the adaptor and plugged it into the cigarette lighter (as I regularly did). I drove on Weisgarber [Road] to the I-40 entrance. I drove west on I-40 to Pellissippi Parkway and drove north. I then turned left on Carmichael [Road] toward the entrance to my subdivision. This road

> was relatively narrow and nightfall had begun, so it was dusky light. About a quarter mile on Carmichael, my mobile phone rang and I looked away from the road to find the phone in the passenger seat and answer it. When I looked back to the road I realized I had veered into the oncoming lane and there were lights ahead of me. I jammed on my brakes, but at that moment, the other car and my car collided. That is the last memory I have until I regained consciousness days later in the hospital.
>
> I have mobile phone records showing the two calls mentioned above. But the call which was not completed because of the crash was a "missed call" and does not show up on the phone bill. The phone probably would have a record of "missed calls" in flash memory, but I have not been able to locate the phone, which must have been lost in the wreckage. The missed call could have been my family calling to see why I had not arrived to take the children to the birthday party. Or it could have been any of dozens of customers or business associates with whom I had many phone calls every day of the week. My work (vice-president of sales and marketing at Highway Transport, Inc.) involved sales and customer relations and was conducted to a great degree by telephone.

The Defendant stated he had abstained from alcohol since the wreck.

According to the presentence report, the wreck impacted the Defendant's life in a number of ways: the investigation report along with a letter from the Defendant's personal physician, Dr. Jeffrey Boruff, indicate that the wreck caused the Defendant permanent short-term memory impairment and a gait abnormality. Shortly after the wreck, but not before the Defendant was released from the hospital, the Defendant's wife instituted a divorce action against him, which she was granted along with full custody of the couple's minor children. Citing the Defendant's divorce and loss of contact with his children, Dr. Boruff opined that the wreck caused the Defendant "a significant amount of emotional trauma." The record indicates that, as a result of his disabilities caused by the wreck, the Defendant receives Social Security Disability benefits. Also, the record shows that the Defendant's father, James L. Sweet, was named as his conservator in order to adequately dispense with the Defendant's legal and medical issues.

The presentence report contained the Defendant's driving record, which indicated that he was issued a new license on September 1, 2006. The report also included a copy of the Defendant's voting record, which indicated that he voted in the November 2006 general state-wide election.

During the sentencing hearing, Donna Bueckman, the music director of Grace Lutheran Church in Knoxville testified that the Defendant attended Grace Lutheran Church and served with her on a "praise team" from 2002 to 2005. She explained that the praise team held weekly rehearsals. Bueckman recounted that during these rehearsals the Defendant, who ordinarily had a

"very good voice," began to have difficulty maintaining pitch. In an effort to assess the cause of the Defendant's performance issue, Bueckman closely observed the Defendant. Detecting the odor of alcohol on the Defendant, she realized that the Defendant was frequently arriving at rehearsal intoxicated. Bueckman testified that this behavior continued for "a long time" and that she eventually approached church leadership for guidance on how to address the Defendant's behavior.

On cross-examination, Bueckman recounted that the Defendant e-mailed her in October 2006, almost a year after the crash, asking her whether he had been "kicked off" the praise team. She responded, reminding him that he had voluntarily withdrawn from the praise team the April before the wreck.

Richard Elseroad, senior pastor of Grace Lutheran Church for fifteen years, testified that he had known the Defendant since the Defendant began attending Grace Luthern Church eleven years before. Pastor Elseroad first said, "I come here with a heavy heart. I love [the Defendant]. . . . He's a wonderful person." The pastor testified, however, that he personally observed the Defendant inebriated once during a church party and once during a praise team rehearsal. Paster Elseroad and his associate pastor, Lane Royder, decided that an intervention was necessary. At some point before the December 2005 accident, Pastor Royder confronted the Defendant and urged him to seek treatment for his alcohol problem.

On cross-examination, Pastor Elseroad testified that the Defendant used to attend Grace Lutheran Church with his wife and two children but that the Defendant did not presently attend the church, although his children and former wife continued to attend. Pastor Elseroad explained that Bueckman originally alerted him to the Defendant's alcohol use. Pastor Elseroad estimated that Pastor Royder's intervention occurred "years before" the wreck. He said he believed the Defendant withdrew from the praise team in April 2005. Indicating he had visited the Defendant several times since the wreck, Pastor Elseroad testified he had seen nothing to indicate the Defendant had consumed "a drop" of alcohol since the wreck. Asked whether the Defendant generally seemed to regret his mistakes, Pastor Elseroad testified the Defendant was "a delightful person who would . . . care about his problems."

On re-direct, Pastor Elseroad stated that the Defendant would be welcome to return as a member of Grace Lutheran Church. He conceded, however, that after Pastor Royder confronted the Defendant about his drinking problem the Defendant neither appeared contrite nor took steps to address his alcohol abuse.

On recross-examination, Pastor Elseroad explained that the Defendant had already withdrawn from the praise team by the time Pastor Royder urged him to seek alcohol-abuse treatment.

Tracey Testerman, the Defendant's ex-wife, testified that she was married to the Defendant

for twenty years and that he began to abuse alcohol about five years before the accident. She explained that, although drinking was acceptable in their household, the Defendant hid alcohol bottles throughout their house, inside rolls of insulation in their garage, under the seats of their car, in golf bags, and in glove compartments. She testified that, after the wreck, she cleaned out his office at work and found an open bottle of vodka in a desk drawer. Testerman testified she became aware of the Defendant's 2004 Texas DUI conviction only "after the fact."

Describing the intervention that Pastor Elseroad initiated, Testerman said that she, her parents, the Defendant's parents, and Pastor Royder met with the Defendant and urged him to visit Bridges for Recovery at Baptist Hospital. She explained that the Defendant's parents agreed their son had a drinking problem and shared equally in the group's concern for the Defendant and urged him to visit Bridges for Recovery.

Testerman recounted that, during the initial interview at Bridges for Recovery, the Defendant admitted his alcohol use was an issue. She explained that the Defendant, however, insisted his alcohol dependence was not severe because he "didn't have to have a drink every morning when he woke up." The program's staff concluded that the Defendant could be treated on an out-patient basis, which would require the Defendant to admit himself at a later date. According to Testerman, the Defendant never admitted himself for treatment.

On cross-examination, Testerman confirmed that the Defendant was comatose for a period of time after the wreck, but she was uncertain whether the Defendant underwent an extensive period of rehabilitation. She testified that, when the hospital released the Defendant in March 2006, she had not yet taken steps to divorce the Defendant. She confirmed, however, that upon his release from the hospital he began to live with his parents. She said she and the Defendant had not co-habitated since the wreck.

Testerman testified that, the Defendant's father being an occasional drinker himself, the Defendant's parents, prior to the accident, did not urge the Defendant to abstain from alcohol. She testified that the Defendant's mother would, however, infrequently express her preference that the Defendant not drink. Testerman said she did not know whether the Defendant had consumed alcohol since the wreck.

Adam Flynn, the surviving victim of the collision, then gave the following victim impact statement:

> I'm here today . . . to basically just say . . . [there are] no words that can describe what . . . I've gone through.

. . . .

> What happened can never be changed. Losing somebody–seeing somebody die right in front of your eyes . . . that you love, that you planned to spend the rest of your life with . . . .
>
> Erica and I had a bright future ahead of us. We planned on being married, having kids, loving each other, and all of that has been ripped away from me.
>
> She was a great person, and I miss her every day that I wake up. And the bad part is there's nothing I can do about it.
>
> As I said before [there are] no words that can describe what I've gone through and the pain that I go through every day.
>
> I'm sure that [the Defendant] has some pain, but I don't believe it's [any]where close to what me and my family [have] gone through. Thank you.

Following Mr. Flynn's statement, Mike Manning, Erica Manning's father, gave the following victim impact statement on behalf the Manning family:

> Erica was a bright, young, loving girl, as Adam stated, had a whole future ahead of her. She touched so many people in her life what time she was here, had a career as a student teacher and as a teacher, and would have touched many more.
>
> No words can describe Erica. She was just a great daughter, a great person. She never met a stranger. She was a very loving kid that had a whole life ahead of her. There's so many things I could say that you just can't describe at all. But every day you wake . . . you wait for that phone call to hear her voice, see her come out of the bedroom for breakfast or [come] in at night, hear the basement door open as she's pulling in that basement, you know, and that will never happen again.
>
> And I feel for the [Defendant's] family[,] too, but you know, Erica didn't cause [any] of this. She wasn't doing [anything], and words can't describe the hurt [her mother and I] feel. Thank you, your Honor.

Each party then gave its closing argument, and, at the close of the hearing, the Defendant

gave the following statement:

> To the family of Erica Manning and Adam Flynn. First of all I apologize and regret from the bottom of my heart for the fact that Erica lost her life and Adam was horribly injured in the accident of 12-30-2005. I've never experienced the torment of the death of a child or sibling so I honestly and genuinely do not have personal experience of what you are feeling, but it must be awful, terrible torment. And I can imagine that when you even look at me you have bitter and hateful feelings, and you have every right to do so.
>
> When you see me you may wonder why and how I can appear so stoic and even look like I am happy and content. Please know that in reality I am, in fact, feeling just the opposite of that. I have lost a lot of sleep and weight because of worry and stress due to the fact that she is gone, and I can't go back and change any choices and actions I took on that awful day. I have wished many times that I could take her place and that she could have lived.
>
> I have a God-given nature of being a friendly and cheerful type of person in general, regardless of the external circumstances around me. You may also be thinking that I have apparently lost nothing at the same time as you have lost Erica.
>
> This is no way equitable to the loss you have suffered, but please consider the following consequences for me: loss of my family. My children have no more respect for me. My injuries will limit my ability to earn a living for the rest of my life. I lost my job. Financially I'm ruined and will be trying to pay off medical and legal bills for the rest of my life. And, again, this is not equal to your loss, and I pray that someday and somehow God will enable you to forgive me.

At the conclusion of the Defendant's statement, the trial judge descended from the bench and, approaching the Defendant, said, "I have spent days trying to figure out what to do in this case, and I want you to look at these pictures because I have over and over." The trial judge then placed five photographs, which depicted Erica Manning and Adam Flynn at various stages of their lives, side-by-side in front of the Defendant. After she re-took her seat at the bench, the trial judge continued:

> [Y]ou have committed a vehicular homicide of Erica Manning and vehicular assault of Adam Flynn, and they have suffered horribly. Take a look. Their families have suffered horribly. Your family has suffered horribly. And you have lost a great deal of yourself, and you too have suffered. But you're right; you can't take anything back and sorry doesn't mean anything.

The trial court then discussed the factors it was considering in its determination of an appropriate sentence for the Defendant. The trial court cited the existence of three enhancement factors, which we will discuss in detail in our analysis, the Defendant's criminal record, and the need to deter like acts. It then sentenced the Defendant to ten years for his vehicular homicide by intoxication conviction and four years for his vehicular assault by intoxication conviction, and it ordered the sentences to be served consecutively for a total effective sentence of fourteen years. The trial court then ordered split confinement for the Defendant, with the Defendant to be released to probation after a year of incarceration in the Knox County Detention Center. Finally, the trial court revoked the Defendant's driving privileges for ten years. It is from these judgments that the Defendant now appeals.

II. Analysis

A. Admissibility of Compelled Blood-Alcohol Test

The Defendant's certified question of law presented for our review challenges the constitutionality of the blood-alcohol test administered to the Defendant while he was unconscious. The State contends that the Defendant's reserved question is not properly before us because it is not dispositive of this case in that the record contains adequate incriminating evidence independent of the contested blood-alcohol test. The Defendant rejoins that this Court should defer to the trial court's finding of dispositiveness because "the sufficiency of the remaining evidence is by no means a certainty."

Because this appeal comes before us as a certified question of law, pursuant to Rule 37(b) of the Tennessee Rules of Criminal Procedure, we must first determine whether the requirements of Rule 37 have been met and whether the question presented is dispositive. Tennessee Rule of Criminal Procedure 37(b)(2)(D) provides as follows:

> (b) When an appeal lies. The defendant or state may appeal any order or judgment in a criminal proceeding when the law provides for such an appeal. The defendant may appeal from any judgment of conviction:
>
> . . .
>
> (2) on a plea of guilty or nolo contendere, if:
>
> . . .
>
> (D) the defendant–with the consent of the court–explicitly reserved the right to appeal a certified question of law that is dispositive of the case, and the requirements of Rule 37(b)(2) are met, except the judgment or document need

> not reflect the state's consent to the appeal or the state's opinion that the question is dispositive.

Tenn. R. Crim. P. 37(b)(2)(D).

A question is "dispositive," as the rule requires, "when the appellate court 'must either affirm the judgment [of conviction] or reverse and dismiss [the charges].'" *State v. Walton*, 41 S.W.3d 75, 96 (Tenn. 2001) (quoting *State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984)). "[T]he determination and agreement of the trial court, a defendant, and the State[1] that a certified question of law is dispositive of the case" does not bind this Court. *State v. Thompson*, 131 S.W.3d 923, 935 (Tenn. Crim. App. 2003). Therefore, we must examine the record on appeal and independently determine whether the question is dispositive before we accept appellate review. *State v. Preston*, 759 S.W.2d 647, 650-51 (Tenn. 1988).

Where the record on appeal demonstrates the existence of evidence not challenged by the certified question that could be used to prosecute a defendant, the certified question is not dispositive. *State v. Dailey*, 235 S.W.3d 131, 136 (Tenn. 2007). Appellate courts frequently disagree with a trial court finding of dispositiveness and, accordingly, decline to consider the reserved question. *See id*. (stating that "numerous attempts to appeal certified questions have been unsuccessful on the basis that the certified question was determined by the appellate courts not to have been dispositive."). For example, in *State v. Brown*, investigators obtained proof of a defendant's drug involvement before a search challenged by a certified question. No. M2004-02101-CCA-R3-CD, 2005 WL 2139815, at *5 (Tenn. Crim. App., at Nashville, Aug. 30, 2005), *perm. app. denied* (Tenn. Feb. 6, 2006). Accordingly, this Court declined to review the lawfulness of the search. *Id*.; *see, e.g., Walton*, 41 S.W.3d at 96 (holding reserved question non-dispositive where other admissible, incriminating evidence existed on the record); *State v. Hendrix*, 782 S.W.2d 833, 837 (Tenn. 1989) (holding reserved question regarding seizure of controlled substances not dispositive "in view of the undisputed evidence of other undisclosed incriminating evidence in the record"); *State v. Bufford*, No. M2004-00536-CCA-R3-CD, 2005 WL 1521779, at *4 (Tenn. Crim. App., at Nashville, June 24, 2006) (holding reserved question not dispositive because the State had incriminating evidence in addition to the defendant's statements made after the allegedly unlawful arrest), *no Tenn. R. App. P. 11 application filed*.

In contrast, where the record does not indicate that the State could have charged a defendant without a challenged item of evidence, an appellate court may properly consider an item's admissibility. For example, in *State v. Dailey*, the State conceded it had no evidence other than the defendant's confession, the subject of the reserved question, upon which to prosecute the defendant,

[1]The State in this case did not consent to the Rule 37 appeal and thus did not agree that the issue is dispositive.

and nothing in the record contradicted this concession. 235 S.W.3d at 136. Our Supreme Court, emphasizing that "it is not an appellate court's duty to question why the record does not contain other evidence or to assume oversight of the underlying criminal investigation," concluded the confession's admissibility was dispositive and, accordingly, reviewed the certified question on the merits. *Id.*

In summary, the record need not, as the Defendant suggests, contain evidence sufficient to support a conviction in order to divest this Court of jurisdiction to hear his appeal. *See Walton*, 41 S.W.3d at 96; *Hendrix*, 782 S.W.2d at 837. It is enough for the record on appeal to demonstrate that evidence apart from the challenged item supports the State's charges. *Dailey*, 235 S.W.3d at 136. If the record does indeed contain evidence in surplus of that which would support the State's charges, then the defendant's reserved question about the item is not dispositive and, therefore, not eligible for review. *See id.*; *see also* Tenn. R. Crim. P. 37(b)(2).

According to the parties' stipulation of proof, the Defendant's friend would have testified that, before the accident, he met the Defendant at a Knoxville bar and observed the Defendant consume five alcoholic drinks. According to this friend, the Defendant left the bar, which was ten miles from the accident scene twenty minutes before the collision, at approximately 5:50 p.m. A married couple traveling behind the Defendant's car less than one minute before the collision would have testified that they observed the Defendant erratically swerve back and forth on Pellissippi Highway, turn onto Carmichael Road, and continue on Carmichael Road at a high speed. The couple also turned onto Carmichael Road and, seconds later, came upon the accident.

A Knox County Sheriff's Department investigator would have testified that emergency medical personnel responding to the accident reported a strong odor of alcohol on the Defendant. The investigator himself observed a strong odor of alcohol in the passenger compartment of the Defendant's car and found an unopened bottle of vodka lying in the debris that had fallen from the Defendant's car. Analyzing the gouge and skid marks from the Defendant's car, the investigator determined that the Defendant crossed the yellow dividing line before he struck the victims' car. A Knox County Sheriff's Department accident reconstructionist examined the "black box" data recording system from the Defendant's car. He would have testified that the records indicated the Defendant stopped accelerating four seconds before impact and applied his breaks one second before impact. The "black box" data also showed the Defendant was traveling at fifty-nine miles per hour when he struck the victims.

In our view, the record contains ample evidence of the Defendant's guilt apart from the blood-alcohol test. *See Walton*, 41 S.W.3d at 96. The constitutionality of the blood test, therefore, is not dispositive of the case because the resolution of this question would not require the dismissal of the Defendant's convictions at issue. *See id*. Even without the test results, the record reflects that the State had ample other evidence of the Defendant's guilt. A determination that the Defendant's blood was unconstitutionally seized would not dispose of the independent proof of the Defendant's

intoxication. *Id.* Accordingly, we conclude the Defendant's reserved questions regarding the admissibility of the blood-alcohol test are not dispositive of this case and, therefore, are not properly before us. As such, we cannot properly review this issue pursuant to Tennessee Rule of Criminal Procedure 37.

B. Sentencing

The Defendant makes numerous objections to both the length and alignment of the sentences he received. Below we address each of his contentions and our corresponding conclusions.

1. Length of Sentences

The Defendant contends that the trial court erred when it sentenced him to ten years for his vehicular homicide by intoxication conviction and to four years for his vehicular assault by intoxication conviction. Specifically, the Defendant argues the trial court: (1) improperly applied two enhancement factors; (2) failed to recognize several mitigating factors; (3) ignored Administrative Office of the Court ("AOC") statistical sentencing information; (4) disregarded the Tennessee Legislature's "heartland assessment" of the offenses; and (5) improperly admitted and gave undue weight to victim impact statements.

When a defendant challenges the length, range, or manner of service of a sentence, this Court must conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). This presumption, however, is conditioned upon the affirmative showing in the record that the trial court properly sentenced the defendant. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to this section note, the burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. If the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In the event the record fails to demonstrate the required consideration by the trial court, appellate review of the sentence is purely de novo. *Ashby*, 823 S.W.2d at 169.

As we will explain in detail below, we conclude that the trial court wrongly applied one

enhancement factor and did not consider several mitigating factors. As such, we review the Defendant's sentence de novo with no presumption of correctness. *See Ashby*, 823 S.W.2d at 169.

a. Enhancement Factors

The Tennessee Code allows a sentencing court to consider the following enhancement factors, among others, when determining whether to enhance a defendant's sentence:

> (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
>
> . . .
>
> (6) The personal injuries inflicted upon, or the amount of damage to property sustained by or taken from, the victim was particularly great;
>
> . . .
>
> (10) The defendant had no hesitation about committing a crime when the risk to human life was high.

T.C.A. § 40-35-114(1), (6), and (10) (2006).

The Defendant first contends that the trial court improperly applied enhancement factors (6) and (10) to enhance his sentences. He argues that, because the trial court failed to follow appropriate sentencing procedures, this Court cannot presume his sentences are correct and should, therefore, reduce his sentences to the statutory minimum after a de novo review. The State concedes the trial court inappropriately applied enhancement factor (6) to the Defendant's vehicular assault by intoxication conviction and, therefore, de novo review is appropriate. However, the State maintains that the trial court properly applied enhancement factors (1) and (10) to both of the Defendant's convictions, which, under de novo review, justify the Defendant's sentences.

The Criminal Sentencing Act of 1989 and its amendments describe the process for determining the appropriate length of a defendant's sentence. Under the Act, a trial court may impose a sentence within the applicable range as long as the imposed sentence is consistent with the Act's purposes and principles. T.C.A. § 40-35-210(c)(2) and (d); *see State v. Carter*, 254 S.W.3d

335, 343 (Tenn. 2008). If an enhancement factor is not already an essential element of the offense and is appropriate for the offense, then a court may consider the enhancement factor in its length of sentence determination. T.C.A. § 40-35-114 (2006). In order to ensure "fair and consistent sentencing," the trial court must "place on the record" what, if any, enhancement and mitigating factors it considered as well as its "reasons for the sentence." T.C.A. § 40-35-210(e). Before the 2005 amendments to the Sentencing Act, both the State and a defendant could appeal the manner in which a trial court weighed enhancement and mitigating factors it found to apply to the defendant. T.C.A. § 40-35-401(b)(2) (2003). The 2005 amendments deleted as grounds for appeal, however, a claim that the trial court did not properly weigh the enhancement and mitigating factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 8, 9. In summary, although this court cannot review a trial court's weighing of enhancement factors, it can review the trial court's application of those enhancement factors. T.C.A. § 40-35-401(d)(2) (2006).

i. **Enhancement of the Defendant's Sentence for Vehicular Homicide by Intoxication**

The Defendant is a Range I offender, and vehicular homicide by intoxication is a Class B felony. T.C.A. § 39-13-213(b) (2003). Therefore, the appropriate range for the Defendant's sentence for vehicular homicide by intoxication is eight to twelve years. T.C.A. § 40-35-112(a)(2) (2003). At the conclusion of the Defendant's sentencing hearing, the trial court applied two enhancement factors to the Defendant's vehicular homicide by intoxication conviction: enhancement factor (1), that the Defendant had a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; and enhancement factor (10), that the Defendant had no hesitation about committing a crime when the risk to human life was high. *See* T.C.A. § 40-35-114(1), (10). The trial court gave the Defendant an enhanced sentence of ten years for his vehicular homicide by intoxication conviction.

The Defendant does not dispute the applicability of enhancement factor (1). The record shows that the State adequately established the Defendant's history of a previous criminal conviction for driving under the influence in Texas. *See* T.C.A. § 40-35-114(1). The Defendant disputes, however, the trial court's application of enhancement factor (10) to this conviction, complaining that the record does not show a "risk to human life" other than that which his vehicular homicide conviction already contemplates.

Enhancement factor (10) applies where the defendant "had no hesitation about committing a crime when the risk to human life was high." T.C.A. § 40-35-114(10). Where, as here, a high risk to human life is inherent in the underlying conviction, enhancement factor (10) applies only if the defendant disregarded a high risk to the life of a person other than the victim. *State v. Zonge*, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997). In *State v. Grady Lee Flippo*, the trial court applied enhancement factor (10) to a defendant's aggravated assault conviction. No. M2006-01182-CCA-R3-CD, 2007 WL 1628868, *10-11 (Tenn. Crim. App., Nashville, June 6, 2007), *no Tenn. R. App. P. 11 application filed*. This Court held that the trial court's application of factor (10) was in error

because, although the record showed other drivers were on the road the day of the offense, it failed to show that "the actions of the defendant actually created a risk to the life of any other specific person." *Id*. Following our reasoning in *Flippo*, the record must establish that the Defendant jeopardized the life of at least one person other than the victim or victims. *Id*. When reviewing enhancement factor (10)'s application to a reckless aggravated assault conviction involving an automobile collision, this Court has affirmed factor (10)'s application based upon the risk posed to persons in a vehicle that traveled behind the defendant's vehicle for a significant amount of time before the accident and eventually was very near the defendant's car as it collided with the victim's car. *State v. Larry Frazier*, No. E2006-009550-CCA-R3-CD, 2007 WL 1552956, *6 (Tenn. Crim. App., Knoxville, May 31, 2007), *perm. app. denied* (Tenn. Sept. 17, 2007) (citing *State v. Dean*, 76 S.W.3d 352, 381 (Tenn. Crim. App. 2001)).

The parties stipulated during the Defendant's plea hearing that Mr. and Mrs. Daniel Hurst would have testified that the Defendant drove erratically and at a high speed shortly ahead of their vehicle just before he collided with the victims' vehicle. The record establishes, therefore, as it did in *Frazier*, that the Defendant created a risk to the lives of two "specific person[s]," Mr. and Mrs. Hurst. *See Frazier*, 2007 WL 1552956, at *6; *Flippo*, 2007 WL 1628868, at *11. We conclude that the record demonstrates that the Defendant, when he committed his crimes, risked the lives of at least two specific persons other than the victims. The trial court appropriately applied enhancement factor (10) to the Defendant's vehicular homicide by intoxication conviction.

The trial court, therefore, correctly applied enhancement factors (1) and (10) to the Defendant's vehicular homicide by intoxication conviction.

ii. Enhancement of the Defendant's Sentence for Vehicular Assault by Intoxication

Vehicular assault by intoxication is a Class D felony. T.C.A. § 39-13-106(b) (2003). Therefore, as the Defendant is a Range I offender, the appropriate range for the Defendant's vehicular assault by intoxication conviction is two to four years. T.C.A. § 40-35-112 (2003). The trial court applied enhancement factors (1) and (10), as well as enhancement factor (6), that the personal injuries inflicted upon the victim were particularly great, to the Defendant's vehicular assault by intoxication conviction. *See* T.C.A. § 40-35-114(6). The trial court gave the Defendant an enhanced sentence of four years for that conviction. While the Defendant does not dispute the application of factor (1), he does contend that the trial court erred in applying factors (6) and (10) to his conviction.

We note that the evidence does not preponderate against the trial court's application of enhancement factors (1) and (10) to the Defendant's vehicular assault by intoxication conviction. Factor (1) was properly applied because, as discussed above, the State adequately established that the Defendant had a history of previous criminal convictions or behavior, in addition to those

necessary to establish the range under which he was sentenced. T.C.A. § 40-35-114(1). As to enhancement factor (10)'s application to this conviction, we note that the Defendant's vehicular homicide and assault by intoxication convictions are based on the same conduct. Therefore, our conclusion that the Defendant did not hesitate to commit vehicular homicide by intoxication in a manner that risked the lives of Mr. and Mrs. Hurst applies, as well, to the Defendant's vehicular assault by intoxication conviction. The trial court did not err when it applied enhancement factors (1) and (10) to the Defendant's vehicular assault by intoxication conviction.

We agree that the trial court erred when it applied enhancement factor (6) to the Defendant's vehicular assault by intoxication conviction. Vehicular assault by intoxication requires proof that, as a proximate result of a person's intoxication, a defendant "recklessly cause[d] serious bodily injury to another person by the operation of a motor vehicle." T.C.A. § 39-13-106(a) (2003). As noted above, enhancement factors may be used to enhance a defendant's sentence only if they are "appropriate for the offense" and "not themselves essential elements of the offense." T.C.A. § 40-35-114. In *State v. Jones*, our Supreme Court, reviewing a trial court's application of enhancement factor (6) to a conviction that required proof of "serious bodily injury," held that proof of serious bodily injury will always also constitute proof of "particularly great injury." 883 S.W.2d 597, 602 (Tenn. 1994), *superseded by* T.C.A. § 40-35-118 (2006) *on an unrelated ground*. "Particularly great injury" due to its similarity to "serious bodily injury" is already, therefore, an essential element of vehicular assault by intoxication and cannot be used to enhance a sentence based thereon. *Id*.; T.C.A. § 40-35-114. As such, the trial court erred when it applied enhancement factor (6) to the Defendant's conviction for vehicular assault by intoxication.

The trial court, therefore, appropriately applied enhancement factors (1) and (10) to the Defendant's convictions but erred when it applied enhancement factor (6) to the Defendant's vehicular assault by intoxication conviction. Because of this error, we will review the Defendant's sentence de novo, without a presumption of correctness. *See Ashby*, 823 S.W.2d at 169. The erroneous application of one or more enhancement factors by the trial court does not, however, necessarily lead to a reduction in the length of the sentence. *State v. Winfield*, 23 S.W. 3d 279, 284 (Tenn. 2000).

In conducting our de novo review of a sentence, we consider the same factors that the Tennessee Code instructs a trial court to consider during sentencing: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the offense, (5) any mitigating or enhancement factors, (6) statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses; and (7) any statements made by the defendant on his or her own behalf. *See* T.C.A. § 40-35-210 (2006); *State v. Foster*, No. W2007–02636-CCA-R3-CD, 2009 WL 275790, *4 (Tenn. Crim. App., at Jackson, Feb. 3, 2009), *no Tenn. R. App. P. 11 application filed*.

b. Mitigating Factors

The Defendant contends that, when sentencing the Defendant, the trial court erred when it failed to consider a number of mitigating factors that apply to the Defendant. Specifically, the Defendant argues that his remorse, his stable employment history, and his poor health should have been considered as mitigating factors. The State maintains that no mitigating factors apply to the Defendant.

As outlined above, the Sentencing Act requires this Court, in conducting its de novo review, to consider all mitigating factors applicable to the Defendant. *See* T.C.A. § 40-35-210; *Foster*, 2009 WL 275790, *4. The burden of proving applicable mitigating factors rests upon the defendant. *State v. Moore*, No. 03C01-9403-CR-00098 (Tenn. Crim. App., at Knoxville, Sept. 18, 1995), *perm. app. denied* (Tenn. 1996). Section 40-35-113 contains a non-exclusive list of mitigating factors and, in subsection (13), calls for the application of any non-listed factor that is "consistent with the purposes" of the Sentencing Act. The following three non-statutory mitigating factors, among others, have emerged in the course of applying subsection (13)'s catch-all provision: (1) a defendant's genuine, sincere remorse; (2) a defendant's work ethic and employment; and (3) a defendant's poor health. *State v. Williamson*, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995) (remorse); *State v. Kelley*, 34 S.W.3d 471, 482-83 (Tenn. Crim. App. 2000) (work ethic); *State v. Art Mayse*, No. M2004-03077-CCA-R3-CD, 2006 WL 1132082, *14 (Tenn. Crim. App. 2006) (poor health), *perm. app. denied* (Tenn. Oct. 9, 2006).

Regarding a defendant's poor health as a non-statutory mitigating factor, a review of case law reveals that a defendant's ill health mitigates against harsh punishment, in general, only where the defendant shows "a causal link between the physical ailment and the instant offense." *State v. Anthony Raymond Bell*, No. 03C01-9503-CR-00070, 1996 WL 103765, *3 (Tenn. Crim. App., at Knoxville, Mar. 11, 1996), *perm. app. denied* (Tenn. Sept. 3, 1996). In *Bell*, this Court affirmed the trial court's refusal to apply the defendant's poor health as a mitigating factor, explaining that, where a defendant does not prove his poor health contributed to his offense, "it is unclear how reduction of a sentence because of the ill health of a defendant would be consistent with the principles of the Sentencing Act." *Id*. In *State v. Claud E. Simonton*, this Court again rejected the application of a defendant's poor health as a mitigating factor where the defendant's poor health "did not contribute to and [did] not excuse" the defendant's offense. No. W2003-0137-CCA-R3-CD, 2004 WL 948371, *6 (Tenn. Crim. App., at Jackson, Jan. 6, 2004), *no Tenn. R. App. P. 11 application filed*. Finally, in *State v. J.D. Jones*, this Court refused to recognize the defendant's poor health as a mitigating factor because, in its view, "to base the length of a Defendant's sentence on the status of his health would frustrate the purposes of the Sentencing Act to serve as a general deterrent to those likely to violate the criminal laws of this State." No. E2004-01565-CCA-R3-CD, 2004 WL 1541309, *15 (Tenn. Crim. App., at Knoxville, July 9, 2004), *perm. app. denied* (Tenn. Dec. 6 2004).

Where a defendant has not shown or does not contend that his poor health caused his offense,

but the record shows the trial court took account of the defendant's health in sentencing the defendant, this Court, generally, has affirmed the sentence. *See Mayse*, 2006 WL 1132082, *14. Highly relevant to the case under submission, this Court in *State v. William Henry Wilson* affirmed a trial court's sentencing of a defendant in poor mental and physical health where the trial court, considering the defendant's health, ordered the defendant to serve his sentence in the Special Needs Unit of the Tennessee Department of Correction. No. E2004-01983-CCA-R3-CD, 2005 WL 1028020, *3 (Tenn. Crim. App., at Knoxville, May 4, 2005), *no Tenn. R. App. P. 11 application filed*. In an anomalous decision, however, a panel of this Court reduced a defendant's sentence because the trial court did not take into account that the Defendant needed oxygen and a cane to walk, had an ileostomy and congestive heart failure, and had been found totally disabled and "seriously limited in his ability to understand and remember" by the Social Security Administration. *State v. Michael R. Harness*, No. E2004-01946-CCA-R3-CD, 2005 WL 2515780, *4 (Tenn. Crim. App., at Knoxville, Oct. 11, 2005), *perm. app. denied* (Tenn. Apr. 3, 2006). The *Harness* panel did not require the defendant to show that his poor health contributed to his decision to offend. *Id*.

In the case at hand, the Defendant asks this Court to apply his genuine remorse, his work ethic, and his poor health as factors that mitigate against a harsh punishment. We agree with the trial court that the Defendant expressed sincere regret over his decision to drive under the influence, resulting in the death of Ms. Manning and severely injuring Mr. Flynn. Also, the record contains adequate information about the Defendant's prior education and employment to satisfy this Court that, in the event he regains his ability to work, the Defendant will do so. We conclude, therefore, that the record supports the existence of two mitigating factors: genuine, sincere remorse and a strong work ethic.

We are not, however, satisfied that the Defendant's bad health mitigates against his culpability. As we explained, a Defendant's bad health only qualifies as a mitigating circumstance where the Defendant demonstrates that his bad health caused or at least contributed to his decision to offend. *See Bell*, 1996 WL 103765, at *3; *Simonton*, 2004 WL 948371, at *6 ; *Jones*, 2004 WL 1541309, at *15; *but see Harness*, 2005 WL 2515780, at *4. The Defendant's injuries in this case are a direct result of his own criminal conduct. In conducting our de novo review of the Defendant's sentence, we will consider only his remorse and his work ethic as mitigating circumstances; his poor health does not diminish his culpability and, therefore, does not mitigate his punishment.

c. AOC Statistical Information

The Defendant contends that the trial court failed to "acknowledge" or give "any consideration" to the AOC statistical information about sentencing trends and that, because the statistics show his ten-year sentence for vehicular homicide by intoxication exceeds the average imposed upon similar offenders for Class B felonies, his sentence should be reduced. The State responds that, because the statistical information does not show the circumstances surrounding the compiled sentences, the information does not require this Court to reduce the Defendant's sentence,

citing for support *State v. Bobby Dior McMillan*, No. M2006-02593-CCA-R3-CD, 2008 WL 2115389, at *4 (Tenn. Crim. App., at Nashville, May 19, 2008), *no Tenn. R. App. P. 11 application filed*.

As the Defendant correctly asserts, Section 40-35-210(b)(6) of the Tennessee Code specifically instructs a sentencing court to consider statistical information generated by the AOC about sentencing practices for similar offenses in Tennessee. Section 210(b) instructs a trial court to consider a number of other factors, as well, in its determination of "the specific sentence and the appropriate combination of sentencing alternatives" to impose.

In *McMillan*, a panel of this Court held that AOC statistical information did not require a reduction in sentence where an explanation of the circumstances surrounding the sentences did not accompany the information. 2008 WL 2115389, at *4. The panel explained its holding:

> [T]he defendant contends that his eleven-year sentence is "considerably longer than the average sentences imposed for this offense." Though compelling, this argument is without merit. . . . [T]he statistics presented by the defendant do not show the circumstances surrounding those cases, and the consideration of the statistics is but one factor the Court is asked to consider.

Id.

According to our review of the record, the Defendant presented the AOC statistical information to the trial court within a subsection of his "Sentencing Memorandum," which he filed the day before the sentencing hearing. The Defendant briefly directed the trial court's attention to this information during his closing argument. As the Defendant maintains, the trial court did not during the sentencing hearing expressly acknowledge either its receipt or its consideration of the sentencing information. In conducting our de novo review of the Defendant's sentence, we now consider the AOC statistical information submitted to the trial court.

In 2008, the AOC published a statistical report of sentencing practices in Tennessee, current through June 30, 2008. One portion of the report breaks down average probation sentences by the year sentence was imposed, the offense class, and the offender's status. The report indicates that in 2007 the average probation sentence length a standard offender received for a Class B felony was 101.6 months, which is 5.6 months greater than the minimum 96-month sentence for a Class B felony. Where split-confinement was ordered, the average length of incarceration was 7.5 months. These average sentences take into account all sentences imposed without respect to what, if any, enhancement and mitigating factors were found to apply.

We need not address the significance of the absence of a circumstantial context accompanying the statistical information.[2] In 2008, the trial court imposed a ten-year (120-month) sentence upon the Defendant, a standard offender, for his vehicular homicide by intoxication conviction, a Class B felony. A ten-year sentence is 18.4 months above the 101.6-month average sentence imposed upon Standard offenders convicted of Class B felonies. In our view, this 18.4 month disparity, in light of the two existent enhancement factors, is not excessive. Therefore, we conclude that the ten-year sentence for the Defendant's commission of vehicular homicide by intoxication is not significantly out of line with the statistical information compiled by the AOC.

d. Legislature's Heartland Assessment of Vehicular Homicide

The Defendant also contends that the trial court, by sentencing the Defendant without discussing the legislature's recent elevation of vehicular homicide by intoxication from a Class C to a Class B felony, ignored the legislature's re-assessment of the "heartland's" response to vehicular crimes due to intoxication. The Defendant argues that the recent re-assessment of the appropriate punishment for vehicular homicide by intoxication indicates that the general assembly "necessarily took into account the anguish, suffering, and anger of constituents and that, by ignoring this re-assessment, the trial court caused "a fundamental breakdown in the . . . sentencing regime." The State responds that the trial court properly sentenced the Defendant within the statutory range.

Where the Tennessee Code provides that a trial court "shall consider"the minimum sentence the Defendant may receive, the Code specifically notes that "the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classification." T.C.A. § 40-35-210(c)(1) (2006). The Code next, however, instructs trial courts to adjust the sentence as the presence of mitigating and enhancement factors requires. T.C.A. § 40-35-210(c)(2). In conducting our de novo review of the Defendant's sentences, we take into account the legislature's re-assessment of the gravity of vehicular offenses due to intoxication, but we do so in the context of the several enhancement factors that weigh against the Defendant.

e. Presentence Report's Inclusion of Mediation Letter

The Defendant objects to the pre-sentencing report's inclusion of a letter prepared during mediation of one of the victim's civil lawsuits against the Defendant. Although the trial court sustained the objection and expunged the letter from the presentence report during the sentencing hearing, the Defendant argues its late expungement was insufficient to cure the letter's prejudice to the Defendant. In our view, the report's original inclusion of the letter did not result in prejudice to the Defendant. He is not entitled to relief on this issue.

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[2] *See* Tennessee Administrate Office of the Courts. (n.d.) *Sentencing Practices in Tennessee*, retrieved Mar. 25, 2009, from http://www.tncourts.gov/geninfo/SentencingStudy/CurrentDocs/2007SentencingGraphZero.pdf

f. Victim Impact Statements

The Defendant contends the trial court erred when it admitted the victim impact statements. He objects to the breadth of the victim impact statements introduced during his sentencing hearing and argues "this Court should guard against a family scrapbook approach to sentencing." The Defendant also objects to the trial court's decision to descend from the bench, approach him, and order him to view the victims' photographs. The State responds that the Defendant failed to object contemporaneously to the victim impact evidence and that he, therefore, cannot now object to the evidence. Alternatively, the State argues that the victim impact statements were all relevant to the nature and circumstances of the Defendant's crime because they showed the "emotional, psychological, or physical effects" of the crime.

The presentence report contained written victim impact statements from Mr. Flynn, his parents, and the parents of the deceased victim, Ms. Manning. The State introduced the following exhibits at the sentencing hearing: a letter from a psychologist who interviewed Mr. and Mrs. Manning, a statement of Mr. Flynn's medical expenses, several photographs of the victims, and two photographs of Ms. Manning's tombstone. During the hearing, Mr. Flynn and the deceased victim's father, Mr. Manning, testified briefly. Mr. Flynn expressed only his sadness over the loss of his fiancée, Ms. Manning. Mr. Manning briefly described his sadness at having lost his daughter and his disappointment that no child would have the benefit of being taught by his daughter, who had almost completed her education degree at the time of her death. He also expressed sympathy for the Defendant's family.

This Court need not grant relief where a party fails "to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36(a). A party, therefore, typically waives review of the admission of any evidence to which the party did not contemporaneously object. *See State v. Reid*, 213 S.W.3d 792, 847 (Tenn. 2006); *State v. Thornton*, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999). Here, defense counsel lodged no explicit, specific objection to any of the victims' oral or written statements, the psychologist's letter, the medical expenses report, or the photographs of the victims. Defense counsel, in his closing argument, reminded the trial court of its responsibility to consider all of the evidence and to not sentence "as an emotional response." In his brief, the Defendant argues defense counsel's comments during closing argument were sufficient to preserve our review of his error. In our view, however, defense counsel's comments in closing argument, as opposed to a contemporaneous objection at the time the presentence report was offered by the State, were not that which was "reasonably necessary to prevent or nullify the harmful effect" of the error he cites. *See* Tenn. R. App. P. 36(a). Therefore, we conclude the Defendant waived review of this issue and, thus, is not entitled to relief.

In the event of further review, we note that Tennessee affords victims a broad right to inform the trial court in non-capital sentencing hearings of the effect of the Defendant's crime upon their lives. T.C.A. § 40-38-103(a)(2) (2006); *see State v. Ring*, 56 S.W.3d 577, 581 (Tenn. Crim. App.

2001). This Court explained in *Ring*, "[a] trial court may consider . . . evidence about the nature and circumstances of this crime in determining an appropriate punishment. However, just like a jury, the trial court's consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence." *Id*. (citing *State v. Nesbit*, 978 S.W.2d 872, 892 (Tenn. Crim. App. 1998)). In our view, the victims' statements, the psychologist's letter, and the photographs were proper victim impact evidence under *Ring*.

Additionally, we briefly address the Defendant's objection to the trial court's conduct at the end of closing arguments. As the portion of the sentencing hearing reproduced above indicates, the trial judge, carrying pictures of the victims, descended from the bench after closing arguments and approached the Defendant. The trial judge then laid the photographs in front of the Defendant and exhorted him to examine the photographs, saying, "I want you to look at these pictures because I have over and over."

A trial court has an obligation to take an "unbiased and dispassionate view of the evidence." *Julie A. Belamy v. Cracker Barrell*, No. M2008-00294-COA-R3-CV, 2008 WL 5424015, *5 (Tenn. Ct. App. Dec. 30, 2008) (citing *Sherlin v. Roberson*, 551 S.W.2d 700, 701 (Tenn. Ct. App. 1976)), *no Tenn. R. App. P. 11 application filed*; *also see Ring*, 56 S.W.3d at 581. We caution that a trial court, especially when faced with compelling, emotional testimony, must strive to maintain its neutral perspective and appearance. In our view, the trial court's actions in this case could be perceived to indicate a disruption in this dispassionate perspective and appearance. Thus, we do not endorse the procedure employed by the trial court. However, we do not conclude that the conduct of the trial court resulted in prejudice to the Defendant.

2. De Novo Review of Sentences

In conducting our de novo review of the Defendant's sentences, we consider the Defendant's presentence report, the victim impact letters and statements introduced during his sentencing hearing, the Defendant's prior conviction, the nature and circumstances of his crimes, the applicable enhancement and mitigating enhancement factors, and the Defendant's allocution statement. *See* T.C.A. § 40-35-210.

The trial court sentenced the Defendant to the maximum of the appropriate sentencing range, four years, for his commission of vehicular assault by intoxication. *See* T.C.A. § 40-35-112(a)(4). The trial court sentenced the Defendant in the middle of the appropriate sentencing range, ten years, for his commission of vehicular homicide by intoxication. *See* T.C.A. § 40-35-112(a)(2).

Notwithstanding the trial court's misapplication of enhancement factor (6) to his vehicular assault by intoxication conviction, the trial court properly applied enhancement factors (1) and (10) to both of the Defendant's convictions. The record shows, however, that both the Defendant's sincere remorse and his stable work ethic are applicable mitigating factors. We conclude, however, that the Defendant's prior criminal behavior and his lack of hesitation to risk the Hursts' lives justify the Defendant's sentences. Further, the principles of sentencing, the nature and circumstances of the

Defendant's crimes, the Defendant's allocution statement, and the AOC statistical information indicate that his four and ten-year sentences are appropriate. We need not, therefore, alter the Defendant's sentences of ten years for vehicular homicide by intoxication and of four years for the vehicular assault by intoxication.

3. Alignment of Sentences

The Defendant contends the trial court erred when it relied on a non-enumerated factor to impose consecutive sentencing. The State concedes the trial court relied on an inappropriate factor but contends the record contains evidence of a valid enumerated factor that, under de novo review, supports the consecutive alignment of the Defendant's sentences. Specifically, the State contends the record contains evidence the Defendant was "a dangerous offender whose behavior indicate[d] little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." *See* T.C.A. § 40-35-115(4) (2006).

A court may order multiple sentences to run consecutively if it finds, by a preponderance of the evidence, that at least one of the following seven factors exists:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b)(1)-(7). In addition to these criteria, consecutive sentencing is subject to the general sentencing principle that the length of a sentence should be "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved for the offense committed." T.C.A. § 40-35-102(1), 103(2); *see also State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). Rule 32(c) of the Tennessee Rules of Criminal Procedure instructs a trial court to explicitly recite on the judgment its reasons for imposing a consecutive sentence.

The trial court's reasons for imposing consecutive sentencing are unclear from the record. When it ordered consecutive sentencing, the trial court noted only that the Defendant victimized two people: "There have been two individuals who have suffered here, and I think I have more than enough to make this sentence consecutive for a total effective sixteen [sic] years." The number of victims involved in a defendant's offense, however, is not a valid basis upon which to impose consecutive sentencing. *See* T.C.A. § 40-35-115(b)(1)-(7). Accordingly, this factor does not support the trial court's imposition of consecutive sentencing. Therefore, we conclude, as the State concedes, that the trial court erred when it ordered the Defendant to serve his sentences consecutively. As the State correctly notes, this Court may nonetheless uphold consecutive sentencing if the record establishes that a statutory basis for consecutive sentencing exists. *State v. Nathaniel Shelbourne, Jr.*, No. M2007-01844-CCA-R3-CD, 2008 WL 4644186, *6 (Tenn. Crim. App., at Nashville, Oct. 21, 2008), *no Tenn. R. App. P. 11 application filed*.

The State argues that the Defendant is a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high" and that, therefore, the record supports consecutive sentencing under subsection 115(b)(4). Our Supreme Court has noted that this "dangerous offender" category is the hardest and most subjective to apply. *State v. Lane*, 3 S.W.3d 456, 460 (Tenn. 1999). Consequently, in order to base consecutive sentencing on subsection 115(b)(4), "particular facts" must show: (1) "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant"; and (2) that the consecutive sentences reasonably relate to the severity of the offenses committed. *Id*.; *State v. Robinson*, 146 S.W.3d 469, 524 (Tenn. 2004); State *v. Wilkerson*, 905 S.W.2d 933, 938-39 (Tenn. 1995).

As to *Wilkerson*'s first prong, our review of case law reveals that, when sentencing defendants convicted of vehicular homicide and assault by intoxication, courts readily recognize the "disregard for human life" necessary to a finding of a "dangerous offender" from the circumstances surrounding a defendant's decision to drive drunk. *See Wilkerson*, 905 S.W.2d at 938 (applying subsection 40-35-115(b)(4) to a defendant with only one prior D.U.I. who drove on a busy divided highway while intoxicated, killing one person and severely injuring another); *State v. Barbara Ann Bryant*, No. W2004-01245-CCA-R3-CD, 2005 WL 756252, *4 (Tenn. Crim. App., at Jackson, Oct. 3, 2005), *perm. app. denied* (Tenn., Oct. 3, 2005) (applying subsection 40-35-115(b)(4) to a defendant who drove while intoxicated, immediately after being discouraged from driving by an acquaintance, killing three people and severely injuring a fourth); *State v. Danny Lee Ross*, No. 01C01-9410-PB-00365, 1995 WL 687694, *6 (Tenn. Crim. App., at Nashville, Nov. 21, 1995), *perm. app. denied* (Tenn. May 6, 1996) (applying subsection 40-35-115(b)(4) to a defendant, out on

bond from a previous D.U.I. charge, who drank throughout the day, left a bowling alley exclaiming "I'm loaded and I ain't through yet," and then sped through a red light, causing a five-car accident that killed three victims).

In these tragic situations involving drunk driving, defendants have received consecutive sentencing based on factors such as the area in which the wreck occurred and whether the defendant ignored intervention efforts. *Wilkerson*, 905 S.W.2d at 938; *Bryant*, 2005 WL 756252, at *4; *Ross*, 1995 WL 687694, at *6. This Court, in *State v. Bryant*, explained why this is so. *Bryant*, 2005 WL 756252, at *4. In *Bryant*, the defendant was convicted of vehicular homicide by intoxication and vehicular assault by intoxication, and the trial court found her a "dangerous offender" and imposed consecutive sentences. 2005 WL 756252, at *4. On appeal, she argued her intoxication negated the mens rea necessary to form the "disregard for human life" necessary for the trial court to enhance her sentence as a "dangerous offender." *Id*. Relying on our Supreme Court's opinion in *State v. Wilkerson*, this Court rejected Bryant's argument and explained why, in crimes by intoxication, courts must emphasize the "risk to human life" and not the defendant's hesitation to offend:

> [In *State v. Wilkerson*], Wilkerson claimed the trial court erred in finding him a dangerous offender. Specifically, he argued that the state had not shown the culpability implicit in the required finding that "he had *no hesitation* about committing a crime in which the risk to human life is high." *See id*. (emphasis added). Our supreme court disagreed, stating that "'[l]ack of hesitation' is semantically close to 'reckless indifference' and signifies a conscious lack of concern for foreseeable consequences." *Id*. at 937-38. The Court quoted favorably its own statement from *State v. Jones*, 883 S.W.2d 597 (Tenn. 1994): "As a practical matter, hesitation or lack of hesitation does not submit readily to proof because of its subjective nature. The more logical interpretation of this enhancement factor places the emphasis on 'risk to human life was high.'" *Wilkerson*, 905 S.W.2d at 937. The high court concluded that Wilkerson's
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> > conduct in this case demonstrated an indifference to the high probability of calamitous consequences to himself and the motorists whom he was certain to encounter as he drove in the wrong direction on a heavily traveled divided highway while intoxicated. He created a high risk of death or serious bodily injury to every motorist on that road. Death or serious bodily injury was almost inevitable. His conduct clearly satisfies the condition stated in Tenn[essee] Code Ann[otated] section 40-35-115(b)(4) and defines the defendant as a dangerous offender.

Id. Therefore, the determination of whether a defendant who drove drunk is a dangerous offender must focus on the factors surrounding the accident, rather than whether the defendant, in his inebriation, hesitated. *Id*; T.C.A. § 40-35-115(b)(4). Also, this Court has deemed as "dangerous offenders" repeat offenders who fail to address their substance abuse with formal treatment after

their crime. *See Wilkerson*, 905 S.W.2d at 934.

In evaluating whether consecutive sentencing is "reasonably related" to the severity of the offense, as the second prong of *Wilkerson* requires, courts have required an extraordinary circumstance to accompany the effects of the crime upon the victim or victims. For example, in *State v. Robinson*, our Supreme Court affirmed subsection 115(b)(4)'s application where the defendant beat and humiliated the victim before killing him. 146 S.W.3d 469, 524 (Tenn. 2004). In *Imfeld*, our Supreme Court affirmed the trial court's finding that, because the defendant's driving under the influence offense involved the severe injury of three children, consecutive sentencing was reasonably related to the severity of the offense. *Id*. at 709.

In the case at hand, the record supports both prongs of the "dangerous offender" basis for consecutive sentencing. The record demonstrates that the Defendant's actions leading up to the accident created a situation where "the risk to human life was high." *See* T.C.A. 40-35-115(b)(4); *Bryant*, 1995 WL 756252, at *4 (citing *Wilkerson*, 905 S.W.2d at 937). The record shows that the Defendant developed a drinking problem as early as two years before the accident. Throughout this time, various members of the Defendant's family and church attempted to convince the Defendant to enter a treatment facility to address his drinking issues. Other than a cursory visit to an intake counselor at one of these facilities, the Defendant refused to treat his alcohol dependence. Six months prior to the accident, the Defendant was convicted of driving drunk in Texas and was sentenced and fined. This punishment was not enough to curb the Defendant's drinking. Indeed, the Defendant continued his dependent relationship with alcohol, which culminated in the tragic events of December 30, 2005. On that day, the Defendant consumed a significant amount of alcohol before beginning his drive home to pick up his children. On the way home, the Defendant swerved into the opposite lane and struck the victims' vehicle, killing Ms. Manning and severely injuring Mr. Flynn. By rejecting intervention efforts, continuing to drink after his Texas D.U.I. conviction, and, ultimately, drunkenly making his way home to pick up his children, the Defendant created a situation where "the risk to human life was high." *See Bryant*, 1995 WL 756242, at *4.

Additionally, although no evidence suggests the Defendant continues to abuse alcohol, the Defendant only briefly consulted with an alcohol abuse counselor after his crimes. The Defendant's failure to seek regular counseling does little to assure this Court that his alcohol dependence will not resurface and cause him to offend again. *See Wilkerson*, 905 S.W.2d at 934. Because of the risk to human life created by the Defendant and because of his failure to seek regular treatment for his alcoholism since the accident, we conclude that "an extended sentence is necessary to protect the public against further criminal conduct by the defendant," as the first prong of *Wilkerson* requires. T.C.A. § 40-35-115(b)(4); *Id*.; *Bryant*, 1995 WL 756242, at *4.

The facts of this case also satisfy the second prong of *Wilkerson*. *See Id*. As the trial court noted, the Defendant's decision to drive under the influence caused the death of one victim as well as the severe injury and prolonged period of recovery of another. Under *Robinson* and *Imfeld*, these facts suggest that consecutive sentencing would reasonably relate to the suffering of the victims. *See Robinson*, 146 S.W.3d at 524; *Imfeld*, 70 S.W. at 709. In summary, because the circumstances

surrounding this case satisfy both prongs of the *Wilkerson*, we conclude that the Defendant is a "dangerous offender" within the meaning of subsection 40-35-115(b)(4) and, thus, that consecutive sentencing is appropriate for the Defendant. Accordingly, we affirm the judgment of the trial court imposing consecutive sentencing.

4. Constitutionality of Tennessee's Consecutive Sentencing Statute, T.C.A. § 40-35-115 (2006)

The Defendant contends that Tennessee's consecutive sentencing statute violates his United States and Tennessee Constitutional right to a jury trial, as interpreted in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The United States and Tennessee Constitutions assign the determination of certain facts, most notably guilt, exclusively to the jury. *Apprendi* expanded the class of facts exclusively assigned to the jury to include "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. The U.S. Supreme Court has applied *Apprendi*'s rule to facts that subject a defendant to the death penalty, *Ring v. Arizona*, 536 U.S. 584 (2002), facts that allowed a sentence beyond a "standard" range, *Blakely*, 542 U.S. at 304-05, facts that prompted an elevated sentence under the then-mandatory Federal Sentencing Guidelines, *United States v. Booker*, 543 U.S. 220 (2005), and facts that permitted the imposition of an "upper term" sentence under a determinate sentencing scheme, *Cunningham v. California*, 549 U.S. 270 (2007).

The Defendant argues that *Apprendi*'s rule should be expanded to facts that subject a defendant to consecutive sentencing. The Defendant acknowledges that our Supreme Court has already declined to expand the Tennessee Constitution's right to a jury to facts that subject a defendant to consecutive sentencing. *See State v. Allen*, 259 S.W.3d 671, 688 (Tenn. 2008). In support of his claim, however, he cites U.S. Supreme Court Justice Stephen Souter's recent comments that advocate expanding *Apprendi* to consecutive sentencing, which he made during the oral argument of *Oregon v. Ice*, Supreme Court cause 07-901, Appellant's original oral argument, transcript page 15, lines 8-22. Since the parties' submission of briefs, however, the U.S. Supreme Court issued its opinion in the matter of *Oregon v. Ice*, and it held that the federal right to a jury trial does not require a jury to determine whether to impose consecutive sentencing and that, therefore, *Apprendi* does not apply to consecutive sentencing. *See Oregon v. Ice*, __ U.S. __, 129 S.Ct. 711, 714-15 (2009). The Tennessee consecutive sentencing statute, therefore, does not offend the U.S. and Tennessee State Constitutions. *Id.*; *Allen*, 259 S.W.3d at 688. As such, the Defendant would not be entitled to relief on this issue in the event of further review.

III. Conclusion

After conducting a thorough review of the record and relevant authorities, we conclude that the certified question is not dispositive and, thus, is not reviewable. We further conclude, however, that the trial court erred in sentencing the Defendant but that under de novo review his ten and four-year consecutive sentences are nonetheless appropriate. Accordingly, we affirm the total effective

sentence of fourteen years imposed by the trial court.

ROBERT W. WEDEMEYER, JUDGE